sons and over 9,000 documents[6] were cleared by the Swiss Federal Attorney. The process of obtaining waivers continued until some 63,000 documents were cleared and released for inspection and were tendered[7] to the Custodian for that purpose on October 15, 1953. In an affidavit filed a few days later Chemie's counsel stated that of the 124 waivers and consents he had solicited, 91 consents had been received, though 17 of them did not appear primarily to involve Sturzenegger papers. A few persons had refused to waive, a few others were dead or did not respond, or were liquidated corporations whose successors could not be located. As to 3 there was evidence that there were no papers pertaining to them. No account books of H. Sturzenegger & Cie. were then tendered although Chemie advised the Custodian of a plan to be submitted to the Swiss government for photostating parts of books the entire contents of which were not cleared, with the matter declared secret blacked out.

By October 20, 1953, Chemie was unable to assure the court that full compliance would be made even if more time were granted. The court thereupon, in a memorandum dated November 16, 1953, stated its opinion that it

[6] This figure is taken from an affidavit filed in the District Court July 14, 1953, by one of the Swiss counsel for plaintiff, in support of an annexed motion for further extension of time. In the affidavit counsel stated that at the time of his departure from Switzerland in July, 1953, the Swiss Federal Attorney "had cleared over 9,000 documents, subject, however, to their being photostated."

[7] The tender was in the form of a letter to the Custodian inviting him to "begin the inspection of Sturzenegger documents," at the offices of plaintiff's counsel in Washington, D.C. The Custodian refused the offer on the grounds that the documents proffered constituted only a part of those ordered produced by the court's order of July, 1949, and that such selective and partial compliance would be rejected. It is not clear from the record what percentage of the papers ordered produced by the July, 1949, order was represented by the 63,000 documents tendered.

was unlikely Chemie could make full production, as had been required by the Swiss government itself in its own earlier investigations of Chemie's ownership. By order of December 21, 1953, the court (a) granted Chemie's motion of the previous July 14th to extend to September 15, 1953, the time for the production, (b) denied Chemie's motion of October 15, 1953, to vacate in part the order of March 31, 1953, and to extend further the time for production, and (c) dismissed the complaint, with prejudice. This last action is the ultimate subject of our review on this appeal.

Chemie's appeal from the dismissal of its complaint leaves unaffected certain counterclaims filed by the Custodian and certain claims of intervening minority stockholders of Chemie to interests in the vested property. See Rule 54(b), *Kaufman* v. *Societe Internationale*, 343 U.S. 156, and *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A.* v. *McGrath (McGranery)*, 17 Fed. Rules Serv. § 24a.2, Case 3 (D.C. D.C.).[8]

The District Court based its dismissal of the complaint on two separate but related grounds, of which Rule 37(b)

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[8] The order of December 21, 1953, dismissing the complaint, with prejudice, expressly states that it "shall not apply to the claims of intervenors Kaufman, Attenhofer, and Klingler or to the claims of any other stockholders hereafter properly admitted as intervenors in this case."

In *Kaufman*, decided April 7, 1952, the Supreme Court reversed this court's decision, 88 U.S. App. D.C. 296, 188 F. 2d 1017, and held that the petitioners, who claimed to be nonenemy minority shareholders in Interhandel, were entitled to intervene as of right under Rule 24(a)(2) in the corporation's suit to recover its seized assets from the Custodian.

Subsequently, on October 23, 1952, the District Court, Pine, J., granted Attenhofer's motion for leave to intervene, which motion Kaufman had opposed. The Master's opinion on the motion had referred to the Attenhofer group as "a management-sponsored group—some of the management are members of it". See 17 Fed. Rules Serv. § 24a.2, Case 3, p. 396.

(2)[9] is more elaborately analyzed by the parties in this court.[10] The court read this Rule in conjunction with Rule 34,[11] which provides that the court on motion may order any party to produce and permit inspection and copying or photographing of any designated documents, papers, books, accounts, etc., not privileged, "which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control * * *." It is clear the papers here in question are

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[9] The District Court pointed out, 111 F. Supp. at 446, that this rule had its parentage in Article [Section] 15 of the Judiciary Act of September 24, 1789, 1 Stat. 82, 28 U.S.C. § 636 (1946), repealed by the Judicial Code of 1948, 62 Stat. 869, 992.

[10] The court also, in its order of December 21, 1953, made an express determination, pursuant to Rule 54(b), Fed. R. Civ. P., that there was "no just reason for delay in entering final judgment dismissing plaintiff's complaint". This Rule authorizes the court to enter a final judgment on one or more but less than all of the multiple claims in an action only upon making such a determination and an express direction for the entry of judgment. See *David* v. *District of Columbia*, 88 U.S. App. D.C. 92, 187 F. 2d 204.

[11] "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just." Rule 34, Fed. R. Civ. P.

within the scope of examination permitted by Rule 26(b), that is that they are not privileged and are relevant to the subject matter of the action. These criteria are again referred to in this opinion.

Rule 37(b)(2), which deals with the consequences of failure to comply with a Rule 34 order to produce, provides that the court may "make such orders in regard to the refusal as are just, and among others the following:"

> "* * * (iii) An order * * * dismissing the action * * *"[12]

In addition, Rule 41(b), Fed.R. Civ.P., provides that

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

In determining whether a dismissal is just under Rule 37 for non-compliance with an order to produce under Rule 34, the provisions of Rule 37 dealing specially with that problem, not Rule 41, should govern. No contrary view was expressed by the court below. Nevertheless, Rule 41 does add its influence in any consideration of the power of the District Court to dismiss a complaint otherwise than by reason of Rule 37.

Confining the discussion for the time being to Rule 37, read with Rule 34, we accept the express conclusions of Chief Judge Laws, unless a different finding is required by the action of the Swiss government, that the papers of H. Sturzenegger & Cie. are in the possession, custody or control of Chemie, see 111 F. Supp. at 442, and the basic

[12] Subparagraph (iii) reads in full as follows:

> "(iii). An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;"

finding implicit in his opinion that they are also within the scope of examination permitted by Rule 26(b) and not privileged.[13] Chemie vigorously contests the conclusions of the District Court as to possession, custody or control; but we accept them. They are set forth clearly and with sufficient fullness in the opinion of Chief Judge Laws of February 19, 1953, 111 F. Supp. 435, in view of which it seems unnecessary for us to elaborate again the factual details. We will, however, discuss the effect of the laws and actions of Switzerland on these subjects. Before doing so we point out that the narration in Chief Judge Laws' opinion of the relation of Hans Sturzenegger to I. G. Chemie, his dominant position with respect to H. Sturzenegger & Cie., which is the successor to Ed. Greutert & Cie., the relation of the three companies to one another and to other companies, including, on information now available, I. G. Farben and other German interests, cannot be said by us to be erroneous. After thorough acquaintance with the case in its various stages over a period of years Chief Judge Laws said he "definitely concludes that the Sturzenegger papers were and are in the possession, custody or control of plaintiff and that except for their confiscation by the Swiss Federal Attorney, plaintiff would be able to produce them." 111 F. Supp., at 442. This finding rests upon a discussion of the evidence which traces the history of the close connection between I. G. Chemie and H. Sturzenegger & Cie. For any purpose relevant to Rules 34 and 37 the findings are sufficient in form and definiteness; and, for purposes of our favorable review, find adequate support in the record. We accept also the further finding and conclusion of the District Court that the Sturzenegger papers are relevant to the issues raised by the complaint of Chemie. We do not understand Chemie to urge the contrary. A number of grounds are set forth in the opinion of the court, 111 F. Supp. at 442, as representing the Govern-

[13] No contention is made in this court that they are privileged.

ment's position with respect to relevancy, followed by the court's recognition that "banking records of the transactions of a corporation are among the best possible indicia of its ownership and control". The court there also said:

> "The records of H. Sturzenegger & Cie. are conceded by plaintiff to be relevant to the issues. Counsel for plaintiff avers he is even more interested and concerned than are defendants in their production, that they are important to him in the presentation of his proof and to meet and refute the allegations of German interests and control made by the Government."

As we have indicated, the papers in question are relevant, are not privileged, and, except for the laws and actions of the Swiss government, are in Chemie's possession, custody or control for the purposes of Rule 34. It does not follow, however, that Chemie's failure to produce them necessarily requires dismissal of its complaint with prejudice, under Rule 37(b)(2)(iii). We consider first, however, whether the action of the Swiss government, and Chemie's good faith, bar such dismissal.

As previously set forth, the Swiss Federal Attorney's order of June 15, 1950, recited that production of the papers would constitute the fact of prohibited economic espionage under Article 273 of the Swiss Penal Code and would also violate bank secrecy under Article 47 of the Swiss Bank Law, "which offense the Federal Authorities have to prevent in order to maintain the public security and order on the basis of their preventative police power". Pursuant to the order he constructively took possession of the papers, or, as we have also said, he seized or confiscated them. Chemie contends that this removed the papers from its "control" within the meaning of Rule 34, even if otherwise they were within such control. This contention no doubt centers upon "control", rather than "possession" or "custody", because physically the papers

remained in the possession or custody of Chemie, though subject to the control exercised by the Federal Attorney. Since his constructive seizure of the records was subsequent to the District Court's order requiring their production, his action bears upon the validity of the dismissal rather than upon the validity of the District Court's order when made.

Rule 37(b)(2), as we have seen, provides that when a party refuses to obey an order to produce under Rule 34 the court may make such order as is just; including one dismissing the action. See subparagraph (iii). Did Chemie refuse to obey? Or, on the contrary, has it merely been unable to obey? If the latter, does its inability, though involuntary, nevertheless constitute a refusal under the Rule? The District Court thought it did. Pointing out that Chemie had the Sturzenegger papers in its actual possession but declined to exhibit them as ordered, the court said,

> "* * * That plaintiff may have had good reason for its refusal would make the act nonetheless a refusal." (111 F. Supp. at 446)

The court then referred to the Advisory Committee Note of 1937 to Rule 37, to the effect that the provisions of the Rule authorizing judgment of dismissal for refusal to make discovery accords with *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, which, the Note continues, distinguishes between the justifiable use of such a measure to compel production of evidence and its unjustifiable use as punishment for contempt, condemned in *Hovey* v. *Elliott*, 167 U.S. 409. *Hammond Packing Co.* v. *Arkansas* involved a refusal to produce which the Court termed a "failure by the defendant to produce what we must assume was material evidence in its posession", and which defendant had the power to produce. It followed, the Supreme Court said, that the entry of a default judgment against defendant found its sanction,

> "* * * in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause." (212 U.S. at 350-1)

In the case at bar our concurrence in the District Court's adoption of the Special Master's report precludes consideration of whether Chemie's efforts to secure the documents were in bad faith, or of whether Chemie could have produced them without violating the Swiss secrecy laws. *Hammond Packing Co.* v. *Arkansas* accordingly seems inapplicable.

Nevertheless, we think it unnecessary to decide whether Chemie's "failure" to produce in the circumstances was such a "refusal" within the meaning of Rule 37 as warranted dismissal of its complaint with prejudice. For it is not a condition to the exercise of the power to dismiss that Chemie's inability to produce be construed as a "refusal". Specification in the Rule of remedial action available to a District Court upon a party's refusal to obey a Rule 34 order does not exhaust the court's powers. This is especially so where the action of a foreign sovereign, though a friendly one, has given rise to the problem, creating a situation hardly contemplated by the framers of Rule 37. Yet we cannot think they intended that a District Court would be powerless to solve the problem in a just manner, consistently with due process of law. We agree with Chief Judge Laws that the power to dismiss is not dependent upon the terms of Rule 37; that is to say, we think it unnecessary to find a refusal within the meaning of that Rule. As he said:

> "* * * apart from dismissal by authority of specific rule of court or statute, a court has inherent power to dismiss a suit, stay a trial or impose other limitations on the right to proceed with trial when it is established a party plaintiff has failed to com-

> ply with order of the court issued pursuant to its rules. See Refior v. Lansing Drop Forge Co., 6 Cir., 1942, 124 F.2d 440, certiorari denied 1942, 316 U.S. 671, 62 S.Ct. 1047, 86 L.Ed. 1746; Note, 4 A.L.R. 2d 348. If this were not so, a court would be powerless to enforce its rules and a litigant might ignore them with abandon. * * *" (111 F. Supp. at 447)

Rule 37 apart, Rule 41(b) would permit dismissal for "failure" of the plaintiff to comply with an order of the court, thus reflecting the power thought by the Rule framers to reside in the court aside from the specific confines of Rule 37.

In the end the question turns upon whether the particular exercise of the power to dismiss with prejudice is consistent with due process of law. We advert now to factors which lead us to conclude that the power as exercised in the present case meets this constitutional test. The property of Chemie, a corporate national of Switzerland, had been vested under the Trading with the Enemy Act. See *Kaufman* v. *Societe Internationale*, 343 U.S. 156, 159. There, in referring to *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, the Court said:

> "* * * We there held that the 1941 amendment [to the Trading with the Enemy Act] authorized the Custodian to seize and vest in himself all property of any foreign country or national, even that of friendly or neutral nations. At the same time we refused to hold that the 1941 amendment deprived friendly or neutral nations or nationals of a right to have their assets returned if they could prove that they were free of any open or concealed enemy taint. * * *"

These cases demonstrate that Congress intended by Section 9(a) of the Act to permit any corporation of a neutral or friendly state to recover property vested under Section 5(b) if "not an enemy or ally of enemy" or, as said in *Kaufman* v. *Societe Internationale*, *supra* at 159, "if they could prove that they were free of any open or

concealed enemy taint." Chemie having filed its action under Section 9(a) to recover property vested under Section 5(b) the principal issue on the merits is whether it was enemy tainted within the principles of *Clark* v. *Uebersee Finanz-Korp., supra.* As we have set forth, and as is more fully detailed in the opinion of Chief Judge Laws, the Sturzenegger papers are material on this issue. They were ordered produced. If the Swiss authorities had not then intervened, and if Chemie had wilfully refused to comply with the order, dismissal of its complaint with prejudice, based on such refusal, would not have been an unconstitutional deprivation of property, *Hammond Packing Co.* v. *Arkansas, supra* at 351. Except for the action of the Swiss Federal Attorney, explicitly designed to prevent their production in this case,[14] the documents could have been produced. For the District Court to hear and decide the case without them might give plaintiff a decisive advantage, leading to recovery of extremely valuable property notwithstanding, were the papers produced, Chemie might be shown to be enemy tainted, in which case the property would be withheld by the United States under existing legislation. True, there is no certainty about this. Uncertainty as to the part the undisclosed papers would play creates the difficulty. But, in view of the findings of the District Court, we think due

[14] This is illustrated by an order of the Swiss Federal Attorney of June 25, 1951, denying Chemie's request to countermand the seizure order and permit Sturzenegger to produce its books and records. In denying the request, the Swiss authority stated: "The said order [seizing constructively the books and records] applies exclusively to the firm Sturzenegger & Co. * * * and against the order of the American court in respect of this banking firm for the production of its business records to the United States District Court * * *." "The fact that the American authorities wish to inspect the records * * * is exactly what gave rise at that time to the issue of the order * * *." The order itself had expressly described the documents thereby confiscated as "the business records or books of the banking firm * * * ordered to be produced by the American judge".

process of law does not require the Custodian to sustain with certainty prior to trial the proposition that the undisclosed papers would defeat Chemie, or the proposition that Chemie's claim can be defeated without them. Where, as here, adequate basis underlies the District Court's findings of relevancy and materiality, and of possession, custody or control, except for the Swiss Federal Attorney's order, so that the indicated relationship between Chemie and H. Stürzenegger & Cie. leads reasonably to the conclusion that the records are important in resolving the issue of Chemie's enemy taint, due process of law is not violated by requiring their production as a condition to trial. In other words it is not fundamentally unfair or arbitrary to require Chemie to comply with an order that is designed, in accepted legal fashion, to elicit the truth or, failing compliance, to dismiss its action, when the requirement is shown to have a very real relationship to the means of arriving at the truth of the substantive issues in the litigation.

Due process in the circumstances of the case does not insist that Chemie be allowed to go to trial in a manner inconsistent with accepted procedures, now embodied in the Rules but which long antedate them in development. Handicap in the conduct, and risk in the outcome, of litigation, due to the absence of evidence reasonably determined on the basis of available information to be relevant and material, need not be cast upon a defendant when a plaintiff by action of its own government is disabled from complying with discovery rules applicable generally to litigants under the law of the forum. Switzerland in her own wisdom, upon consideration no doubt of many factors, has rendered her national, Chemie, unable to comply with a valid order of the trial court in an important matter respecting the evidence. The order itself is not inconsistent with due process of law. *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541. To require compliance as a condition to

Chemie's further prosecution of its claim is to insist that if the trial is to go forward it shall do so in accordance with accepted procedures for developing the truth about contested factual issues raised by Chemie, the ultimate objective of the trial. This too is not a denial of due process of law, since, to borrow the test applied to legislation, "the means selected * * * have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U.S. 502, 525, 537.[15] *Lapides* v. *Clark*, 85 U.S. App. D.C. 101, 102, 176 F. 2d 619, 620, *cert. denied*, 338 U.S. 860. See, also, *Minder* v. *Georgia*, 183 U.S. 559, 562; *Davidson* v. *New Orleans*, 96 U.S. 97, 107-8, separate opinion of Mr. Justice Bradley; *Missouri Pacific Railway Co.* v. *Humes*, 115 U.S. 512, 519, 520; *Ballard* v. *Hunter*, 204 U.S. 241, 255; *Endicott Co.* v. *Encyclopedia Press*, 266 U.S. 285, 288; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 584-5; *Carolene Products Co.* v. *United States*, 323 U.S. 18, 31-2.

It will be seen from the foregoing discussion that our view, like that of the court below, does not lean heavily upon the theory of a factual presumption adverse to the one who fails to produce the papers ordered, as in *Hammond Packing Co.* v. *Arkansas*, *supra*, nor upon the theory of punishment, discredited in *Hovey* v. *Elliott*, *supra*.

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[15] In *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 708, the Supreme Court said:

> "* * * It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause * * * means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. * * *"

Though there may be some element of adverse factual presumption, we rely chiefly on the necessity for discovery as an aid in the development of facts. This is particularly important in such a case as this, where the intricacies of relationships are so difficult to unfold and their geographical locale is centered so close to the former enemy, and where the secrecy laws which Switzerland deems wise prevent discovery which on adequate showing is deemed material to the case.

What we have here said is fortified by established legal principles. It is settled that "the fullest possible knowledge of the issues and facts before trial" is intended by the rules governing discovery. *Hickman* v. *Taylor*, 329 U.S. 495, 501. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Ibid.*, p. 507. In *Dixon* v. *Ramsey*, 7 U.S. (3 Cr.) 319, 324, involving the authority of an executor appointed in a foreign country to sue in the courts of this country, Chief Justice Marshall said: "No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country." "[S]ubstantive matters are governed by the foreign law, and procedural matters, or, as it is more usually expressed, matters relating to the remedy are governed by the law of the forum." 3 Beale, Conflict of Laws (1935) 1600. *Don* v. *Lippman*, 5 Cl. & Fin. 1, 7 Eng. Rep. 303, 307 (H.L. 1837). In a footnote to the opinion of the Court in *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, at 134, it is said that a foreign sovereign suing as a plaintiff must give discovery, citing *Rothchild* v. *Queen of Portugal*, 3 Y. & C. Ex. 594, 596; *United States* v. *Wagner*, L. R. 2 Ch. App. 582, 592, 595; *Prioleau* v. *United States*, L. R. 2 Eq. 659. See, also, *King of Spain* v. *Hullett*, 7 Bligh N.S. 359, 392-3 (H.L. 1833). A foreign national is in no better position.

The *Prize Cases*, now to be considered, are also enlightening as to the force which the courts have recog-

nized as residing in rules or court orders requiring discovery. Discovery has been insisted upon notwithstanding it was forbidden by the law of the sovereign of the claimant; and failure on his part to make discovery has at times resulted in dismissal of his claim.

In *The Consul Corfitzon* [1917] App. Cas. 550, Swedish claimants to cargo seized on the high seas appealed from an order of the Admiralty Division requiring them to produce certain books of account and other documents. They had declined on the grounds they might become liable to penalties under Swedish law. In affirming the discovery order the Privy Council stated that "a Court of Prize cannot properly be deterred from making * * * the appropriate order because a neutral claimant would, if he obeyed the order, be guilty of a breach of his own municipal law", *ibid.*, p. 555, adding that the "practice and procedure [of the forum] are governed by the municipal law of the state from which it derives its jurisdiction".

In *Steamship "Antilla" and Other Vessels*, 7 Lloyd's Prize Cases 401, broad discovery orders of the *Consul Corfitzon* variety had been made relating to claimants' business books, but had been complied with only partially. Claimants, being unable to promise full compliance, requested permission to try the case on the evidence available. The court denied the request and struck the claims, stating:

> "* * * that when orders are made by this Court, and are not appealed from, they must be taken to be valid orders, and they must be obeyed. If they are not obeyed, those claimants upon whom they are made will be in contempt and their claims will be liable to be struck out. * * * (*Ibid.*, p. 405)

The Baron Stjernblad [1918] App. Cas. 173, 178, reiterated the Prize Court's policy of refusing "to accept the dictates of any municipal law as to what discovery ought or ought not to be insisted on either generally or

in any particular case." The Privy Council recognized the foreign claimant was put in the anomalous position of either losing his case or incurring penalties in his own country, but pointed out that "the anomaly is certainly not due to any defect in the practice of the Prize Court or in the law which it administers." *Ibid.*, p. 179.

There is a reference to *Kronprinsessan Margareta* in 6 Lloyd's Prize Cases 105 n. The Privy Council is said to have denied leave to appeal from the dismissal of a claim when the Swedish claimant declined to answer some of the interrogatories administered to it on the court's authorization because permission to answer had been requested and denied by the Swedish government. It was said this refusal made no difference in the Prize Court.

In *The Kronprinzessin Victoria* [1919] App. Cas. 261, a trial had taken place, at which the claimants declined to produce their books in court because of Swedish laws. Holding that the court properly refused to let the Swedish secrecy law affect its weighing of the evidence in deciding against claimants the Privy Council pointed out, at p. 267, that "if the evidence by which their case might have been cogently supported was required for their other business in Sweden, it was for them to choose whether they would conduct their case or their business to the better advantage."

In Re Von Kantzow's Patent [1944] Ch. 318, 321, was a non-prize case where applicants sought extension of certain British patent rights in order to recoup revenue losses allegedly suffered during the war. Due to Swedish secrecy laws they were unable to furnish evidence that they had not made countervailing profits abroad during the war. Consistently with the prize-case principle of maintaining discovery orders over contrary foreign law, the court said:

> "* * * It appears to me that this court, having placed on it the delicate task of determining whether

its discretionary jurisdiction should be exercised in favour of an applicant in a matter in which the public interest also is concerned, must be told all the relevant facts. If an applicant is the subject of a foreign State and is precluded by his municipal law from giving the necessary information to the court, that is his misfortune."

Chemie might have some remedy at the hands of its own government for any loss it can place at her door, but this of course is beyond our help. We merely note that when Switzerland takes action of the character here involved, which she deems beneficial to herself and her nationals as a whole, the disadvantage caused a particular national in litigation abroad is fairly left where the law of the forum places it.

We have considered an alternative solution; that is, to permit the case to go to trial without the unproduced papers, as was requested and denied in *Steamship "Antilla" and Other Vessels, supra*, with possible action, because of failure to produce, to await eventualities. If Chemie were unable to show the absence of enemy taint, or failed in other respects to prove its case, judgment would be rendered for the Custodian on the merits. And if Chemie did make out its case but in the court's view the unproduced documents might if available lead to a different result, the court could then dismiss if the failure to produce persisted. But we think the District Court was not required to adopt this alternative. Since dismissal was within its powers we should not without strong reasons disapprove the manner in which it exercised control over litigation of which it bears the heaviest burden. Years have been consumed in preliminaries and in efforts to obtain full discovery as ordered. The District Court has become thoroughly acquainted with the factors which led to its decision. We cannot say it has abused its discretion or acted unjustly, or that its failure to adopt some other possible course constitutes reversible error.

We add in t[illegible]s connection that not only production, but production before trial, is important; for the Custodian should have the benefit of discovery for cross-examination and preparation.[16] Moreover, the alternative suggested, with no definite conclusion in sight, would be a very unsatisfactory way of proceeding with a long trial.

One modification, however, we deem advisable, namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this court in this case, and not then if within such period discovery is made as ordered.[17] This will afford another opportunity to bring the case on for a trial and decision on the merits.

Affirmed with modification.

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[16] This would be so even were the court to refer the matter to a Special Master in order to save some of its own time.

[17] We speak of discovery in general terms, since there is no reason to think that the District Court will require actual production in the United States if other arrangements, such as for inspection or copying in Switzerland, can reasonably be made.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13460 and 13527

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., APPELLEES

Appeals from the United States District Court for the District of Columbia

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Decided April 11, 1957

Mr. John J. Wilson, with whom *Messrs. Roger J. Whiteford, Philip S. Peyser* and *Duane G. Derrick* were on the brief, for appellant.

Mr. David Schwartz, Attorney, Department of Justice, with whom *Messrs. George B. Searls, Sidney B. Jacoby, Paul E. McGraw* and *Ernest S. Carsten,* Attorneys, Department of Justice, were on the brief, for appellees.

Before WILBUR K. MILLER, FAHY and DANAHER, *Circuit Judges.*

PER CURIAM: We consolidated appeals from orders of the District Court which had (1) refused to give appellant (plaintiff) additional time within which to obtain and produce for inspection records of the banking house, H. Sturzenegger & Cie of Basle, Switzerland, not previously obtained and tendered to the appellees (Government) and (2) dismissed plaintiff's complaint with prej-

udice. Various aspects of the litigation were earlier treated by the District Court,[1] and by us.[2]

We provided that dismissal of the complaint with prejudice was not to become effective until six months after the receipt by the District Court of our mandate, and not then, if within that period discovery had been provided as ordered. Our mandate was received by the District Court January 24, 1956, and by July 24, 1956, plaintiff had obtained and assembled in Washington many thousands of Sturzenegger records. Plaintiff sought an extension of time from the District Court and submitted a proposed discovery plan which had been approved by the Swiss Government. It was contemplated that full discovery was to be achieved by permitting an independent investigator, a neutral, to inspect the Sturzenegger files to ascertain which of certain unknown remaining records were relevant. It was further contemplated that production of such records could be assured by letters rogatory or by copying. The District Court declined further relief, and on August 3, 1956, plaintiff's complaint was dismissed with prejudice and on August 21, 1956, plaintiff's motion to vacate the order of dismissal was denied.

That plaintiff and its counsel patiently and diligently sought to achieve compliance with the District Court's discovery order is not to be doubted. There is no question of lack of diligence, indeed plaintiff is quite right in its suggestion that delays in the disposition of the case were "inherent in its nature." Basically, however, the

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[1] Societe Internationale, Etc. v. McGranery, 111 F. Supp. 435 (D.C.D.C. 1953).

[2] Societe Internationale, Etc. v. Brownell, 96 U.S. App. D.C. 232, 225 F. 2d 532 (D.C. Cir. 1955), *petition for rehearing en banc denied* Sept. 1, 1955, *cert. denied*, 350 U.S. 937 (1956), *petition for rehearing denied*, 350 U.S. 976 (1956).

problem was summed up adequately by Chief Judge Laws, thus:

"... At the end of more than seven years now, I just find no assurance whatever that these papers that we have ordered to be produced will be produced. I don't see how the plaintiff is going to be able to comply with that order so long as the Government of Switzerland continues its confiscation of the papers.

"Now, under the laws of the United States, there is no provision whatever for a neutral to decide what papers are relevant or what are not, in reference to this case, and under the applicable rules of the United States courts, there is no requirement that any party to a case should be forced to proceed by way of letters rogatory to obtain documents in custody of one of the parties. I think it very well may be unfortunate that the plaintiff must be deprived of its trial by reason of the laws of another nation and the acts of its representatives. I must confess I have quite a little sympathy for counsel for plaintiff, because I know that counsel have worked extremely hard to comply with the order, and I have made a formal finding that they acted in good faith, including the plaintiff. But the procedural laws of the United States, as well as the substantive laws, may not be relaxed upon its courts because of difficulties a party may have with a different sovereign power.

"In my view, nothing short of a complete release of the papers by the Government of Switzerland, leaving this court or its representative in a position to decide what is relevant or what is to be produced, will comply with our laws. I simply don't see how I would have any right whatever to permit a neutral to come in there to take the place of this court or its special master. If I did that, I think that would write something new into the rules of the court; and that is as far as we have gotten, at the end of now seven years."

No more need be said. Plaintiff's American assets were seized in the United States as enemy owned prop-

erty and title, pursuant to law, was vested in the Alien Property Custodian and his successor, the Attorney General. Plaintiff sought recovery of the vested assets on the premise that it is not and was not an enemy or an ally of an enemy. In the course of the ascertainment of the plaintiff's right, resort having been had to our courts, the papers in question became relevant. We concluded that they are not privileged, and except for the laws and actions of the Swiss Government, there is no doubt they could and would have been amenable to the discovery which our courts ordered under rules deemed essential and conducive to the proper and orderly administration of justice in a court of the United States. Since we have held that it was not fundamentally unfair or arbitrary to require the plaintiff to comply with an order designed to elicit the truth, or, failing compliance, to dismiss the action, the District Court's orders were within its powers. There is no error.

Affirmed

IN THE
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 13460 and 13527

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., APPELLEES

Petition of Appellant for Rehearing En Banc

Appellant hereby petitions this Court for rehearing *en banc* in respect of the opinion of this Court of April 11, 1957 (Circuit Judges Wilbur K. Miller, Fahy and Danaher).

In its opinion, this Court affirmed orders of the District Court (1) dismissing appellant's complaint with prejudice for appellant's involuntary inability to comply with a discovery order, and (2) refusing to extend the time fixed in this Court's opinion of June 30, 1955.[1] In so ruling, the District Court had refused to consider appellant's plea that it had substantially complied with the discovery order, and also had turned down appellant's suggestion of an impartial investigation to bring to light missing papers—if any—as a basis for further efforts to identify them or to effectuate their release.

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[1] 96 U.S. App. D.C. 272, 225 F. (2d) 532.

I. Dismissal of Appellant's Complaint Before Trial Without any Fault on Its Part Is a Denial of Justice

The rulings below, as affirmed in the opinion of April 11, in effect denied appellant access to the Courts of the United States to recover valuable property of which appellant was wrongfully deprived by administrative *fiat*.[2] Such a denial of justice is the most severe penalty a court can impose on a civil litigant. In the absence of a showing of bad faith on the part of appellant, and in the absence of any concrete indication that trial of the case would prejudice appellees' rights, a court having jurisdiction over parties and subject matter can not refuse to hear issues of law and of fact on their merits without violating the express provisions of the Federal Constitution. Fifth Amendment to the Federal Constitution; *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322; *Hovey* v. *Elliott*, 167 U.S. 409; *McVeigh* v. *United States*, 11 Wall. 259; *Duell* v. *Duell*, 85 U.S. App. D.C. 78, 178 F(2d) 683.

In the case at bar, no doubt exists as to appellant's good faith. Nor can it be said that unless appellant's complaint is dismissed *before trial* appellees' rights will be prejudiced,

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[2] Appellant's property was confiscated in 1942 under the broad vesting powers of the Trading with the Enemy Act, 50 U.S.C. App. § 5(b), which only required an administrative determination that the property was owned by *foreign nationals*—not enemies. No hearing was had at that time. Nor was any hearing held in 1947, when appellant's request for return of its property pursuant to the same Trading with the Enemy Act was turned down, and no reason for such refusal was given except an administrative *ex parte* statement that it would not be "in the national interest" to comply with appellant's request. Now and at all times appellant is ready to prove affirmatively that it is entitled to a return of its property under the Trading with the Enemy Act, and the rules of international law. Appellees, on the other hand, have consistently avoided the submission of their case to scrutiny by a judicial or administrative tribunal, in this country or abroad.

or are even reasonably likely to be prejudiced in fact or in law.[3]

In the light of these facts, it is submitted that this Court's ruling runs counter to the foregoing decisions. The problem is no longer one of interpreting the Federal Rules of Civil Procedure as to discovery and power to dismiss. This case turns on a fundamental question of constitutional law. It is for this reason that appellant now urges this Court to reconsider in a rehearing *en banc* the important legal issues presented.

II. This Court Failed to Take Into Consideration Appellant's Claim That It Has Substantially Complied With the Discovery Order.

In its opinion of April 11, this Court *assumed* that appellant had not complied with the trial court's discovery order. Appellant had complained of the District Court's failure to investigate this question, and this became an important point for consideration by this Court.

Appellant has obtained and tendered to appellees over 200,000 records of the Sturzenegger Bank. J.A. 15. It claims and has claimed below that this constitutes substantial compliance with the discovery order. In support of its plea of substantial compliance, appellant tendered the 200,000 records for inspection by appellees. J.A. 15. Although defects inherent in the discovery order make it impossible to know which of the Sturzenegger records

[3] Appellees' contention of injury is pure speculation. They have contended that they needed discovery of certain unidentified papers to prepare their defense. There has been no showing that substantial discovery was not already made, or that there are any other documents in existence which would facilitate appellees' defense. Indeed, appellant is willing to participate in a procedure which will bring to light and identify any other document, wherever located, relevant to the issues at bar, assuming that any additional relevant documents exist outside the hundreds of thousands already tendered for discovery.

had to be produced, appellant sincerely believes that this much greater number of documents now tendered contains all the records it was ordered to produce.

Appellees deny that the records tendered to them constitute substantial compliance because they are not represented as constituting all the bank's records. However, no evidence has ever been produced to support their contention, and appellant was not required to produce *all* the bank's records. Indeed, appellees have refused even to look at the papers offered to them. How can it be seriously maintained, then, that appellant failed to comply with the discovery order, and should thus be denied a trial on the merits?

Whether or not appellant did in fact comply with the discovery order has become the pivotal question on which hinges the return of its confiscated property. Appellant's claim that it has substantially complied should have been investigated by the lower court. Simple justice required a hearing before this particular issue could be determined adversely to appellant. The trial court refused to consider appellant's claim. It did not even look or ask appellees to look at the mass of papers obtained by appellant at great cost and effort. It assumed, without considering any of the facts available, that discovery had not been made. This, we submit, was fundamental error below, and this Court apparently omitted to pass upon the point.

III. This Court Erred in Refusing Appellant's Request for an Impartial Investigation and Further Efforts to Supplement Discovery.

Appellant suggested that, since neither it nor appellees had access to the Sturzenegger files, an impartial investigator be appointed to examine these files in Switzerland and to report on the possible existence and identity of additional relevant documents, if any such documents existed. Further efforts could then be made to obtain them. J.A. 28-32.

This Court preceeded on the assumption that the auxiliary discovery plan outlined above could not replace physical discovery of the Sturzenegger documents as ordered, and that therefore appellant's complaint had to be dismissed. This reasoning, appellant submits, is defective for the following reasons:

The additional discovery plan was never intended as a substitute for discovery as ordered by the trial court, but merely as an auxiliary check made necessary by faulty designation and identification in the discovery order of the records to be produced. Appellant might have stopped once it had obtained many times the required number of documents. Such discovery, pertaining to the issues at bar, was indeed substantial compliance with the trial court's order. If appellant has gone further by suggesting a supplementary investigation, it did so not as an admission of weakness, but because it wishes to be certain that all *relevant* Sturzenegger records, whether or not they are covered by the discovery order, will be available to the parties for trial.

This Court did not, and indeed could not, deny that appellant's auxiliary discovery plan would *in fact* have brought to light all remaining relevant evidence, if any exists beyond the records already tendered. Even if by unlikely hypothesis[4] certain records could not be produced, their nature and identity would be unequivocally disclosed.[5] This, in turn, would have permitted the lower court to determine *at trial* and in concrete instances whether the established absence of a name on a given document—nothing else could possibly be withheld—was crucial and should be resolved by an inference against appellant.

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[4] Not one concrete or even likely instance was cited where a relevant Struzenegger document would be unavailable.

[5] Admittedly, the only information the bank might be compelled to withhold are the names of customers who have not waived their secrecy rights.

By discarding the auxiliary discovery plan—which, if nothing else, would have served the purpose of testing appellees' speculative contention that they would be prejudiced by the absence of some records—the Court deprived appellant of its right of action upon the ground of its inability to produce records which may well turn out not to exist, or to be irrelevant.

The Federal Rules of Civil Procedure do not give parties an absolute right to all physical evidence before trial, particularly where, as here, it is not in fact available to their opponents. They provide for a mutual exchange of information, *Hickman v. Taylor*, 329 U.S. 495, mitigated by many exceptions and by the provisions of Rule 30(b) which states that discovery shall be ordered only in such a manner as not to cause harassment and oppression; Rule 30(b) Fed. R. Civ. P.

The auxiliary discovery plan was certain to bring to light all the information to which the parties were entitled. Its use of an independent investigator followed a pattern well known and recognized in American practice. *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corporation*, D.C. S.D. N.Y. 1955, 16 F.R.D. 513. How then could appellees claim that they would be deprived of an established right? The auxiliary discovery plan is designed to give them all the information they could desire. Surely, it cannot be held that the vague possibility that unidentified information might not be available—through no fault of the parties—would require that the case be thrown out of court! The way to handle such an unlikely eventuality is by raising presumptions or inferences against the party having the burden of proof. The time to do so is at trial, when the issues are joined and when the absence of specific evidence acquires a concrete significance.

IV. Conclusion.

For these reasons, it is urged that this Court reconsider *en banc* the serious issues presented in this case. The

previous rulings have had the effect of reviving a sporting theory of justice by making it possible for appellees to jockey appellant into a position where it cannot obtain relief from the courts against confiscatory actions of the Government. It is submitted that appellant's predicament—regretted by this Court in its opinion of April 11—is not due to any desire to evade fullest discovery, nor to inability to make discovery due to Swiss law or to other factors. It is really caused by appellees' persistent refusal to cooperate in obtaining or analyzing the desired information from the Sturzenegger files. Appellant firmly believes that had appellees inspected the available Sturzenegger records and cooperated in implementing the auxiliary discovery plan, this case could be readily tried on the basis of all *relevant* evidence existing in the Sturzenegger files or elsewhere. The penalty imposed on appellant is not only harsh and contrary to established principles of law; it is also unnecessary.

It is respectfully submitted that, to avoid a serious denial of justice, the instant motion for a rehearing *en banc* should be granted.

We, Roger J. Whiteford and John J. Wilson, attorneys for appellant, hereby certify that this petition for a rehearing *en banc* is filed in good faith and not for delay.

ROGER J. WHITEFORD
JOHN J. WILSON
Attorneys for Appellant

April 26, 1957.

I hereby certify that on the 26th day of April, 1957, I caused copies of the foregoing Petition for Rehearing *en banc* to be delivered to the office of Sidney B. Jacoby, Esq., Office of Alien Property, Washington, D. C., one of the Attorneys for the Appellees.

JOHN J. WILSON